

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL GRAVELEY, individually and : CIVIL ACTION
GRAVELEY ROOFING CORPORATION :
 :
v. :
 :
CITY OF PHILADELPHIA, et. al. : NO. 90-3620

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

August 12, 1998

Plaintiff Graveley Roofing Corporation ("GRC") has filed a motion for attorney's fees and costs that defendant City of Philadelphia ("the City") opposes on the grounds that the requested fees are patently excessive and the motion is not in compliance with the court's order. For the reasons stated below, the court will award GRC costs and reasonable attorney's fees attributable to the prosecution of GRC's claim only.

BACKGROUND

In 1990, GRC and its president, Michael Graveley ("Graveley"), filed a complaint seeking class certification and damages for injuries sustained by the City's enforcement of Chapter 17-500 of the Philadelphia Code ("the Ordinance"). The Ordinance required that 25% of any City contract with a party other than a minority or female owned business be subcontracted to minority or female owned business. GRC bid on various public works contracts with the City at times when the City was applying the Ordinance to increase the participation of disadvantaged business enterprises ("DBE") in city contracting.

A group of contractors challenged the constitutionality of the Ordinance in Contractors Ass'n of E. Pa. v. City of Philadelphia. Upon motion for summary judgment, Judge Bechtle found the Ordinance unconstitutional on April 5, 1990. Contractors Ass'n of E. Pa. v. City of Philadelphia, 735 F. Supp. 1274 (E.D. Pa. 1990). Finding that the parties were entitled to more discovery before a summary judgment decision could be made, the Court of Appeals vacated Judge Bechtle's initial summary judgment decision. Contractors Ass'n of E. Pa. v. City of Philadelphia, 945 F.2d 1260 (3d Cir. 1991). After allowing further discovery, Judge Bechtle again granted summary judgment in favor of the plaintiffs. Contractors Ass'n of E. Pa. v. City of Philadelphia, 1992 WL 245851 (E.D. Pa. Sept. 22, 1992). The Court of Appeals affirmed the decision to grant summary judgment as to the female owned business preference but reversed Judge Bechtle's grant of summary judgment on the minority business preferences. Contractors Ass'n of E. Pa. v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993). On remand, following a nine day non-jury trial, Judge Bechtle again found the statute unconstitutional as to minority business preferences, Contractors Ass'n of E. Pa. v. City of Philadelphia, 893 F. Supp. 419 (E.D. Pa. 1995), and was affirmed by the Court of Appeals. Contractors Ass'n of E. Pa. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996). Certiorari was subsequently denied by the Supreme Court.

Contractors Ass'n of E. Pa. v. City of Philadelphia, --- U.S. ---
, 117 S.Ct. 953 (1997).

After Judge Bechtel's initial summary judgment decision, Contractors Ass'n of E. Pa. v. City of Philadelphia, 735 F. Supp. 1274 (E.D. Pa. 1990), plaintiff Michael Graveley, individually and as President of GRC, filed this class action on behalf of contractors adversely affected by the Ordinance. During the pendency of the Contractors Ass'n action, this case was placed in administrative suspense by agreement of counsel.

This action was removed from administrative suspense in 1997. In September, 1997, plaintiffs filed an amended motion for class certification on behalf of a class comprising three groups: (1) unsuccessful bidders who would have been awarded a contract but for the Ordinance; (2) successful bidders whose profits were diminished because their successful bids would not have included subcontracting to DBEs but for the Ordinance; and (3) bidders who were fined or had payment withheld for failure to comply with the Ordinance. The motion for class certification was denied.

Graveley v. City of Philadelphia, 1997 WL 698171 (E.D. Pa. Nov. 7, 1997). A non-jury trial was held on the individual claims of GRC and Graveley only.

Because liability had already been established by the final judgment in Contractors Ass'n, the two day non-jury trial was on causation and damages only. Originally GRC sought damages for

seven claims: (1) the Northwestern Stables claim; (2) the Starr Garden Playground claim; (3) the Mann Music Center claim; (4) the Tioga Marine Terminal claim; (5) the Packer Avenue Marine Terminal claim; (6) the Pier 6 claim; and (7) a claim for legal fees. GRC withdrew the Starr Garden Playground claim at the outset of trial, and the court ruled that evidence on the Tioga Marine Terminal and Pier 6 claims was not admissible because the contracts were not with the City of Philadelphia. The economic damages sought by GRC at trial totaled \$368,788. GRC prevailed on three of its seven original claims and proved the following economic damages:

- (1) Northwestern Stables contract profits: \$15,226.50;
- (2) Mann Music Center monies withheld: \$14,182.08;
- (3) Legal fees incurred in connection with the City's actions on these contracts: \$7,283.53.

There was insufficient evidence of loss of profits caused by compliance with the Ordinance on the Packer Avenue Marine Terminal contract. Michael Graveley did not recover on his claim for emotional distress.

On February 6, 1998, judgment was entered in favor of GRC in the amount of \$36,692.11 in economic damages and \$21,224.34 in prejudgment interest. The total judgment was in the amount of \$57,916.45. Judgment was entered in favor of the City against Michael Graveley on all his individual claims. Graveley v. City

of Philadelphia, 1998 WL 47289 (E.D. Pa. Feb. 6, 1998).

Plaintiff GRC was given leave to file for attorney's fees attributable to its claim alone. Plaintiff GRC now claims fees in the total amount of \$373,195.35 for 1,413 hours of work expended by four law firms, and \$3610.67 in costs. The City opposes the petition on the following grounds:

- (1) The rates claimed are excessive and unjustified.
- (2) The hourly rates claimed are not reasonable and should not be based on a class action rate.
- (3) The hours claimed were not reasonably expended.
- (4) Hours spent on class certification should not be included because the class was not a prevailing party.
- (5) A negative multiplier should be employed to reflect lack of success.

Plaintiff's motion for leave to file a reply to defendant's answer because "the City has raised lengthy objections to the motion for fees that require a response," (Brief for GRC's Motion for Leave to File a Reply at 1), was granted. A hearing was also held to allow plaintiffs' counsel an opportunity to be heard in view of the significant objections to the petition.

Defendant filed a motion to strike plaintiff's supplemental motion for attorney's fees because plaintiff filed a supplemental motion subsequent to the date specified in the Order. The court

has considered the supplemental filing, and the motion to strike will be denied.

DISCUSSION

I. PREVAILING PARTY

A prevailing party in a civil rights action is entitled to reasonable attorney's fees. 42 U.S.C. § 1988(b). See Hensley v. Eckerhart, 461 U.S. 424 (1983). The definition of "prevailing party" should be construed broadly to trigger a fee shifting statute. Public Interest Group of N.J. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995). A prevailing party is one who is successful on any significant claim and who is afforded some of the relief sought. See Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 791 (1989); Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh, 964 F.2d 244, 250 (3d Cir. 1992). GRC was successful on three of its seven claims, and was granted relief. GRC is entitled to reasonable attorney's fees. Neither Michael Graveley individually nor the class prevailed on any of their claims; neither is entitled to fees or costs.

The determination that GRC is a "prevailing party" merely meets the initial threshold for recovering fees and costs; the court must then determine a reasonable award. See Hensley, 461 U.S. at 433. "[T]he district court retains a great deal of

discretion" in determining the award. Bell v. United Princeton Properties, Inc., 884 F.2d 713, 721 (3d Cir. 1989). For example, the court may exclude hours not reasonably expended, which includes hours that are excessive, redundant, or otherwise unnecessary. See Hensley, 461 U.S. at 434; Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). If only partial success has been achieved, the fee request may be excessive if all the hours spent in litigation are used in the calculation. See Hensley, 461 U.S. at 436. This may be true even when interrelated and non-frivolous claims are made. See Rode, 892 F.2d at 1183.

II. LODESTAR

In determining a reasonable fee, the calculation begins with a "lodestar"--a reasonable hourly rate multiplied by the number of hours reasonably expended. See Hensley, 461 U.S. at 433. Plaintiffs are responsible for submitting evidence of the hours worked at the rates claimed. Id. at 433. If the defendant opposes the fee award, it has the burden to challenge the reasonableness of the requested fee. See Rode, 892 F.2d at 1183.

A. Reasonable Hourly Rate

Hourly rates must be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum v. Stetson, 465 U.S. 886, 896 n. 11 (1984). See also Smith v. Philadelphia,

107 F.3d 223, 225 (3d Cir. 1997). The prevailing market rate is usually deemed reasonable. See Public Interest Group of N.J. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995). A reasonable rate is one which will attract adequate counsel but will not produce a windfall to the attorneys. Id.

Plaintiff's counsel claim hourly rates ranging from \$195 per hour to \$550 per hour. They submit resumes as proof of experience and qualifications, and an affidavit and declarations stating that these rates are reasonable and reflective of market rates. However, the resumes, affidavit and declarations reflect appropriate billing rates for class action litigation, not for "similar services." This was not a class action; class certification was denied. The prevailing market rate for class action litigation is irrelevant. The class action rates have frequently been set in connection with settlements creating a common fund and are rarely the rates paid hourly by clients. (See Reply, p. 6, n. 2.) Leading class action attorneys frequently work in teams as lead counsel and have a common interest in establishing high "market" rates for their services and their appraisals of colleagues' rates are self-serving. Court-awarded hourly rates in class action litigation are much more objective, but, if awarded from a common fund instead of against an individual defendant, not necessarily more helpful. The hourly rate should be judged on the prevailing market

rate for attorneys of comparable skill level and experience in civil rights litigation or general litigation. The actual litigation was not complex; liability had been determined, and plaintiff had to establish only causation and damages.

Plaintiff seeks fees for work done by four law firms in this action:

1. Lawrence E. Feldman & Associates

Lawrence E. Feldman & Associates have claimed a total of \$128,863.75 in fees for 531.75 hours at the following hourly rates: Lawrence E. Feldman, \$350; Roseann E. Weisblatt, \$245; Gail L. Gottehrer, \$245; and Kenneth J. Benton, \$245.

In considering the hourly rate of Lawrence E. Feldman, the court has considered the representations in the Motion for Attorneys Fees and his supporting affidavit (Exhibit H) and declarations of attorneys and his client.

Lawrence E. Feldman has been practicing since 1978 as a general practitioner and public interest/consumer lawyer. He claims a practice with significant emphasis on class actions, although he was unwilling to rely on his own experience when prosecuting the class action aspects of this litigation. In addition to the assistance of Michael R. Needle, he engaged first Berger & Montague, P.C. and then Kohn, Swift & Graf, P.C. who expended 725.50 hours for work on class issues in comparison to 531.75 hours by Mr. Feldman's firm, which handled all aspects of

the litigation. It hardly seems as if Mr. Feldman should command a rate as a class action lawyer higher than Steven M. Steingard of Kohn, Swift & Graf, P.C. who appears to have done the great bulk of the work on class action issues.

The highest reported rate ever awarded previously by a court to Mr. Feldman in a class action was \$140 an hour with a 78% enhancement of the lodestar for excellent representation. That was 11 years ago, in a common fund case where plaintiff's counsel prevailed on the class issues. Here the plaintiff class did not prevail and the court cannot compliment counsel on representation of a class that was never certified or increase the fee accordingly.

Accepting the declarations of J. Dennis Faucher and Mark C. Rifkin as if they were sworn, their conclusions as to Lawrence E. Feldman, Michael R. Needle, Steven M. Steingard and Russell D. Henkin are confined to personal experience in class action litigation and the market billing rate in Philadelphia for partners of comparable experience in class action litigation. Mr. Feldman's client's unsworn declaration states the client actually paid Mr. Feldman an hourly rate of \$350 per hour, but it was for trademark and business litigation where attorneys competed in a national market.

A more meaningful comparison is offered by the City in the legal fees charged in the Contractors Association action for a

comparable time period. The court may take judicial notice of the fee petitions filed in that action, which was far more complex and difficult but ultimately largely successful. In Contractors Association, the action that established the basis for liability here, over half of the hours billed were recorded by J.H. Widman (1156.25 hours out of 2030.50 hours) at an hourly rate of \$185. (See City's Memorandum in Opposition, Exhibit A; Plaintiffs' Brief in Support of Motion for Attorney's Fees, p. 12.) See also Contractors Ass'n of E. Pa. v. City of Philadelphia, 1996 WL 355341 (E.D. Pa. Jun. 20, 1996). The highest rate charged by a partner in that action was \$205/hour (J.J. McAleese, Jr.). Mr. McAleese's and Mr. Widman's rates of \$205/hour and \$185/hour, respectively, are better indicia of the Philadelphia market rate than the self-serving, unsworn declaration of colleagues at the class action bar. The court declines to apply the class action rates to non-class litigation. While Mr. Widman's rate of \$185 might be appropriate, the court will award Lawrence E. Feldman an hourly rate of \$205 as adequate compensation for civil rights litigation in the Philadelphia market.

Roseann E. Weisblatt, Esquire, Gail L. Gottehrer, Esq., Kenneth J. Benton, Esq., are associates at Lawrence E. Feldman & Associates and have been billed at \$245 per hour. None of these attorneys filed an affidavit as to their experience or regular

billing rates (or hours expended). With the exception of Ms. Weisblatt, the only information provided is an unsworn firm resume.

Ms. Weisblatt is a 1994 graduate of Temple Law School who has participated in a number of class actions; if any hourly rate for her was ever awarded by a court, it has not been provided. The firm publicity piece also states she has played a key role in the litigation and settlement of several medical and intellectual property lawsuits. A client, Steve Green, filed an unsworn declaration that he consulted with Ms. Weisblatt and paid her rate of \$245 per hour; no information is provided as to how often or the nature of the consultation. The information about Ms. Weisblatt is too insubstantial for a meaningful fee award.

Ms. Gottehrer received her J.D. degree from the University of Pennsylvania in 1992. She entered practice in the area of complex litigation, consumer class actions, after a clerkship with a judge of the Court of Common Pleas.

Mr. Benton received a law degree from Tulane Law School (date unstated) where he was editor of the Tulane Law Review. He has also participated in a number of class actions.

Again, the most meaningful comparison is the rates awarded associates in the Contractors Association action. It was more difficult, complex and larger than this action and established the liability rendering this case so simple. The highest rate

charged by as associate was \$170/hour. (See City's Memorandum in Opposition, Exh. A.) There is insufficient information to distinguish the hourly rates of the associates in this action. While the court would be justified in denying fees for the hours charged by Ms. Weisblatt, Ms. Gottehrer and Mr. Benton, \$170 per hour is a reasonable rate for each for the work they did.

For some unknown reason, Lawrence E. Feldman & Associates also engaged a contract attorney, Debra Aisenstein, Esq., who was billed at \$120 per hour. Her background and experience are unknown; whether Lawrence E. Feldman & Associates actually paid her that amount is also unverified. Therefore, without any basis for a fee award whatsoever, the court declines to set any hourly rate for Debra Aisenstein, Esquire.

Some hours are attributed to a number of unidentified paralegals at an hourly rate of \$75.00. There is no affidavit as to this rate being usual or customary for paralegals of similar education and experience. These charges are disallowed for lack of substantiation.

2. Michael R. Needle, P.C.

Michael R. Needle seeks an hourly rate of \$350 per hour for himself and \$200 per hour for Marcia Widder. He has filed an untimely declaration that his rate is usual and customary (based on the rate historically charged to clients in litigation of this nature) and charged by similar firms in the Philadelphia area for

this type of legal work. An unsworn declaration of J. Dennis Faucher, Esq., states that an hourly rate of \$300 per hour is reasonable for Mr. Needle. No information as to his years of experience or nature of his practice are included, but the court is personally familiar with Mr. Needle's litigation skill as he has appeared before it. There is no doubt in the court's mind that he may on occasion be awarded \$300 or \$350 per hour for class action settlements; clients may even pay him such rates for ordinary business litigation. But a cursory glance at his verified statement shows his work was almost entirely devoted to class action strategy and class action procedure. Only 5.25 hours of the 155.75 hours claimed are conceivably related to the prevailing claims of GRC, although the court recalls no participation of Michael R. Needle, Esq., in the trial preparation, or trial of those claims. While the court will compensate him for 5.25 hours, there is no reason to set the rate higher than the \$205/hour awarded Lawrence E. Feldman. As to the hourly rate of Marcia Widder, no information has been provided, but none is necessary because all the hours she expended were on class action proceedings. No fees will be allowed for Marcia Widder.

3. Kohn, Swift, & Graft, P.C.

Since its founding in 1969, the firm of Kohn, Swift & Graf, P.C., has been a national leader in class actions and other

complex commercial litigation. Kohn, Swift & Graf, P.C. and its partners have been selected by courts and co-counsel to be lead counsel, or members of the executive committee of counsel, in scores of class actions throughout the country in the toxic tort, antitrust, securities fraud, and consumer protection fields. The firm also maintains a general business litigation practice representing plaintiffs and defendants in state and federal courts.

The amounts claimed purport to be rates ordinarily charged to the firm's clients and its usual and customary hourly rates charged for work performed for other clients. The bulk of the work was performed by Steven M. Steingard at \$305/\$315 per hour. Biographical information for Mr. Steingard and unsworn declarations of J. Dennis Faucher, William A. Harvey and Mark C. Rifkin that Steingard's hourly rate of \$305 was reasonable were provided. No biographical or other information was provided as to anyone else.

The court does not doubt the firm's expertise in class actions, and the statements in the firm resume:

The Kohn firm is also prosecuting two of the most closely watched international human rights cases in legal history, In re Ferdinand Marcos Human Rights Litigation, (D. Ha.), [a class action], and the pending Holocaust Victims', (E.D.N.Y.) Class action against the Swiss banks.

(Petition for Attorneys Fees, Exh. E, p. 2).

However, it is impossible to tell if Kohn, Swift & Graf

performed any work on GRC's individual claims. After the denial of class certification, most of the firm's time appears to have been concerned with the possibility of appealing the denial of class certification and notice to the putative class of denial of certification. Of course, no notice of denial of class certification was required, but the court agreed, with consent of the City, to notify non-class members of their individual rights. Such a notice did not benefit GRC, the prevailing individual plaintiff, so no time will be awarded for this activity. Since Kohn, Swift & Graf, P.C. has not established performance of legal services for which fees should be awarded, there is no need to establish hourly rates for the six lawyers and four paralegals of that firm.

4. Berger & Montague, P.C.

The firm of Berger & Montague, P.C. claims compensation for 378.30 hours for 10 lawyers and unnamed paralegals; the hourly rates range from \$340/hour to \$550/hour; the paralegal rate claimed is \$115/hour. Berger & Montague provided no declaration of any attorney but a firm resume with information about three of the lawyers and laudatory statements of judges about the firm's performance. In the court's opinion, this does not meet the requirements for hourly rates charged clients in other than a class action settlement context, nor does it substitute for verified individualized statements of experience and hours

expended. The unsworn declarations of J. Dennis Faucher and William A. Harvey, both state "Hankin's" rate of \$385 per hour is within the range of billing rates for partners of similar experience in the Philadelphia area. Peculiarly, they both misspell the name of the Berger & Montague partner for whom an award is claimed, as he is reported to be Russell D. Henkin in the firm brochure.

The court sees no need to establish hourly rates for any of the Berger & Montague, P.C. attorneys; the firm withdrew prior to denial of class action certification. It is apparent that all the firm's activities were with regard to the class issues, rather than the individual issues on which GRC prevailed. Why a fee petition was filed on behalf of this firm in view of a specific court order to the contrary is incomprehensible to the court. An appropriate hourly rate is irrelevant because no fees will be awarded.

B. Hours Reasonably Expended

The prevailing party is expected to make a good-faith effort to exclude from a fee request excessive, redundant, or otherwise unnecessary hours. Hensley, 461 U.S. at 434. Where a plaintiff does not prevail on a claim which is distinct from his successful claim, the hours spent on the unsuccessful claim should not be included in the "lodestar" calculation. Id. at 434.

Here, class certification was denied; plaintiff was not the

prevailing party on this issue. The hours in pursuit of class certification "cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.'" Hensley, 461 U.S. at 435 (quoting Davis v. County of Los Angeles, 1974 WL 180, at *3 (C.D. Cal. Jun. 5, 1974)).

The hours expended on behalf of other parties and their injuries were not necessarily intertwined with GRC's injuries or the amount of GRC's damages. Pursuant to the court's order, "[p]laintiff is entitled to reimbursement of costs and fees attributable to the prosecution of GRC's claim only." Graveley v. City of Philadelphia, 1998 WL 47289 (E.D. Pa. Feb. 6, 1998). Hours reasonably expended on the GRC litigation include the filing of the original amended complaint, which discussed GRC's claims, discovery on behalf of GRC, and time spent pursuing damages claim.

For reasons stated with regard to hourly rates, neither Kohn, Swift & Graf, P.C. nor Berger & Montague, P.C. have established that any hours were reasonably expended on the issues on which GRC prevailed. Michael R. Needle will be compensated for 5.25 hours.

The remaining question is the time reasonably expended by the firm of Lawrence Feldman & Associates on behalf of GRC on its prevailing claims. No effort has been made by Lawrence Feldman & Associates to comply with the court's order to restrict its fee

petition to GRC's individual claims. It would have been easy for the firm to comply with the court's order by segregating time spent on the unsuccessful class representation and the trial of the claims of GRC and the individual claims of its President, Michael Graveley. But it is very difficult for the court to do so based on the limited information provided in the fee petition.

Because the petition was inconsistent with the court's orders and grossly excessive, the court could strike the petition in its entirety and make no fee award. That seems extreme when the court has an alternative method which achieves rough justice. The court will award Lawrence E. Feldman & Associates only those hours expended after the denial of class certification on November 7, 1997.

| <u>Attorney</u> | <u>Hours</u> |
|----------------------|--------------|
| Lawrence E. Feldman | 46.75 |
| Roseann E. Weisblatt | 89.25 |
| Gail L. Gottehrer | 9.50 |
| Kenneth J. Benton | 27.75 |

While this excludes some time spent on GRC's successful claim prior to denial of class certification (i.e. drafting the complaint), that exclusion is balanced by time expended after denial of class certification on class issues (i.e. notice of denial to purported class members) and Michael Graveley's individual unsuccessful claim.

The City argues with some merit that hours expended even on prevailing issues are excessive. Allegedly experienced

attorneys who claim rates of \$350 per hour submitted recorded hours with several attorneys performing the same tasks, such as taking depositions, drafting motions or preparing for trial. However, much of the City's argument is directed at duplicative effort which by and large has been excluded by the court. Therefore, the court will award all hours of Lawrence E. Feldman & Associates post-class certification denial (without prejudice to negative adjustment of the lodestar).

The court will not award time for preparing this fee petition, even on behalf of GRC, as it was in egregious violation of the court's instruction to confine the petition to work on behalf of GRC only. Moreover, the submission in its entirety was not timely or in proper form. The dilatory submissions by Michael R. Needle and supplemental unverified declarations in support of the hourly fees would have justified striking the fee petition in its entirety, as was requested by the City. The court has made great effort to determine what is properly awardable notwithstanding the unusual burden placed upon it.

III. SUCCESS

The lodestar calculation does not complete the fee inquiry. Other considerations may lead the court to adjust the fee upward or downward, including the "results obtained," Hensley, 461 U.S. at 434, but a court may not reduce fees solely to maintain some ratio between fees and damages awarded. See Davis v.

Southeastern Pa. Transportation Authority, 924 F.2d 51, 55 (3d Cir. 1991); Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1041 (3d Cir. 1996).

However, a court may consider the amount of damages awarded as compared to the amount of damages requested as one measure of how successful the plaintiff was in its action. See Washington, 89 F.3d at 1042. This success, or lack thereof, may be taken into consideration when awarding fees. Id. at 1042. If the figure awarded has been greatly reduced from the amount requested, it may be considered reflective of relative lack of success on the merits.

The City argues that the fee should be further reduced to reflect the plaintiffs' lack of success at trial. GRC prevailed on only three of its seven original claims. A modest 5% deduction for overall lack of success would ordinarily be appropriate, but the court will not impose the reduction because of the unusual posture of the action. Plaintiff's counsel did have difficulty in discovery as to GRC's claims. While the court believes the difficulty is attributed to plaintiff's unsuccessful insistence on class action status, the City's litigation posture regarding discovery on the individual claims also contributed. The court declines the City's invitation to reduce GRC's fees due to lack of success on all its claims.

A. Risk Enhancement

A court may adjust the award for the necessity of attracting adequate counsel if the risk involved would otherwise prevent it. See Rode, 892 F.2d at 1184; Vargas v. Hudson, 949 F.2d 665, 675 (3d Cir. 1991). Plaintiff seeks a risk enhancer, describing this litigation as a complex and drawn-out civil rights case. Counsel claim the risk enhancer as a "carrot for future attorneys" provides the proper incentive to take on difficult case. (Plaintiff's Brief in Support of Motion for Attorney's Fees, at 10.)

It is unclear whether contingency is a proper factor for enhancement in an action not involving a common fund. See City of Burlington v. Dague, 505 U.S. 557 (1992); Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711 (1987). If a contingency enhancement is ever appropriate, it is not in this action. This action was taken on a contingency because of the prospect of class action status; a class was not certified. If the fee is contingent on success in certifying a class, there was no success on that issue; and the attorneys involved are entitled to no fee enhancement for their failure.

The individual action on which GRC prevailed was simple; liability had been established and only causation and damages remained to be proved. This complaint was filed on May 27, 1990, subsequent to the Judge Bechtle's initial decision to grant plaintiffs' motion for summary judgment in Contractors Ass'n of

E. Pa. v. City of Philadelphia, on April 5, 1990. Considering the original outcome of this case and the Supreme Court's decision regarding minority set-asides in City of Richmond v. J.A. Croson, 488 U.S. 469 (1989), the risk enhancer "carrot" to attract capable attorneys was not necessary. The action provided an opportunity for GRC to recover damages, not an opportunity for plaintiff's counsel to gain a windfall of fees.

Although counsel merely needed to establish causation and damages, plaintiffs' counsel failed to prevail on four of the seven claims. The court sees no reason to reward plaintiffs' counsel by enhancing the lodestar for the modest achievement. It is preposterous to punish the City defendant for successfully defending a class action by having it pay fees and costs for unsuccessful claims. See Vargas, 949 F.2d at 676; Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711 (1987).

The court also rejects the argument that fees should be enhanced because this lawsuit was "politically incorrect." Plaintiff had no trouble obtaining counsel; four law firms now claim fees. See Metropolitan Pittsburgh Crusade for Voters v. City of Philadelphia, 964 F.2d 244, 252 (3d Cir. 1992). There is no case law under 28 U.S.C. § 1988 awarding an enhancement for "political incorrectness;" none has been cited, nor has counsel provided any evidence of harm to them or their firms from undertaking the Graveley cause. Indeed, judging by the hourly

rates and allegations of each firm's recognized national competence and esteem, it would be hard to conclude this action harmed any lawyer except as he or she fails to recover for unsuccessful activity.

B. Delay Compensation

Finally, the court recognizes the delay factor; a court should not hesitate to compensate attorneys for the time gap between the actual expenditure of services and the fee. See Rode, 892 F.2d at 1188. See also Keenan v. City of Philadelphia, 983 F.2d 459, 476 (3d Cir. 1992). However, here the delay was occasioned by the class action issues. Plaintiff's counsel agreed to delay this action until the final resolution of Contractors Association for obvious reasons of judicial efficiency.¹ The class issues were resolved as soon as the Contractors Association judgment was final by action of the U.S. Supreme Court. Unfortunately for counsel, the determination of the class action issue was unfavorable to the class.

After denial of class certification on November 6, 1997, the action was listed for trial on January 27 and 28, 1998, and decided on February 6, 1998. The delay in deciding the fee petition was caused by the extra work incident to the nature and quality of plaintiff's submissions. While plaintiff was awarded

¹ Plaintiff's counsel repeatedly tried, unsuccessfully, to have this action assigned to Hon. Louis C. Bechtel, as related to Contractors Association to achieve the same result.

prejudgment interest, its counsel is not entitled to delay compensation where the individual claim was tried this year and would have been tried years ago if presented as an individual rather than class claim. The fees awarded will be based on the current rates of the attorneys involved because substantially all the time expended on behalf of GRC's claim was in fact expended at current rates.

Pursuant to the order issued by this court, "[p]laintiff is entitled to reimbursement of costs and fees attributable to the prosecution of GRC's claim only." Graveley v. City of Philadelphia, No. 90-3620, 1998 WL 47289 (E.D. Pa., Feb. 6, 1998). Hours reasonably expended on behalf of GRC include the filing of the original amended complaint, which discussed GRC's claims, discovery as to GRC's claims for causation and damages, pretrial preparation and trial. Lawrence E. Feldman & Associates certainly did work in each of these stages of the litigation. However, plaintiff's counsel did not delineate which hours were on behalf of GRC, rather than the class, and instead claimed all hours both on behalf of GRC individually and the non-certified class. The court has attempted to provide the reasonable fee award allowed by 42 U.S.C. § 1988 by awarding Lawrence Feldman & Associates all hours after denial of class certification, whether or not on behalf of GRC individually. Michael Needle was also awarded time after the denial of class certification for hours

arguably attributable to GRC's individual claims. The other firms performed legal services on behalf of the class, not GRC, and will not be awarded fees.

Therefore, the adjusted lodestar is:

| <u>L. Feldman & Associates</u> | <u>Hours</u> | <u>Rate</u> | <u>Fee</u> |
|------------------------------------|--------------|-------------|-----------------|
| Lawrence E. Feldman | 46.75 | \$205 | \$ 9,583.75 |
| Roseann E. Weisblatt | 89.25 | 170 | 15,172.50 |
| Gail L. Gottehrer | 9.50 | 170 | 1,615.00 |
| Kenneth J. Benton | <u>27.75</u> | 170 | <u>4,717.50</u> |
| Total | 173.25 | | \$31,088.75 |
| <u>Michael R. Needle</u> | 5.25 | 205 | \$ 1,076.25 |

IV. COSTS

Lawrence E. Feldman & Associates seeks costs in the amount of \$1,658.36, and its predecessor Needle & Feldman seeks \$657.50. The court received no affidavit that these costs were in fact incurred, although the costs were mentioned in Lawrence E. Feldman's declaration under penalty of perjury.

Two itemized lists of expenses have been filed. The expenses are totally unexplained but, based on general knowledge, the following expenses are allowed:

| | |
|-------------------|------------|
| USDC Filing Fee | \$ 120.00 |
| Kangaroo Couriers | 11.50 |
| Kangaroo Couriers | 4.60 |
| UPS | 11.00 |
| Lexis-Nexis | 565.86 |
| Lexis-Nexis | 107.11 |
| Lexis-Nexis | 189.98 |
| Lexis-Nexis | 10.86 |
| Lexis-Nexis | 101.49 |
| Lexis-Nexis | 372.21 |
| Total | \$1,484.61 |

All other expenses are disallowed as either usual office expenses or insufficiently substantiated.

Michael R. Needle, P.C. has filed a supplemental petition for expenses in the itemized amount of \$102.50 from March 11, 1997 through January 27, 1998. The itemized expenses submitted by Michael Needle, P.C. are not allocated to Graveley Roofing's individual claim as the court's Order required; they appear to be almost entirely attributable to pursuit of class issues (as to which plaintiff did not prevail). Expenses for copying, fax and postage, should ordinarily be included in an attorney's regular hourly rate (in this case, claimed to be \$350/hour). There is no way to determine if the library research, travel or printing relate to Graveley's individual claim, but it is doubtful because all expenses were incurred before class certification was denied and Lawrence Feldman has declared that his firm took over the trial of this action in the summer of 1990. The court recalls no participation of Michael R. Needle or Marcia A. Widder in the preparation of the trial of the individual claim of Graveley Roofing or Michael J. Graveley. No costs will be allowed.

Kohn, Swift & Graf, P.C. has claimed \$485.43 in itemized costs expended from October 14, 1997, through November 19, 1997. Kohn, Swift & Graf were retained for their national class action reputation, as suggested by their firm resume highlighting the Ferdinand Marcos Litigation and the Holocaust Victims class

action. The work the firm performed was on the class certification motion, discovery on behalf of the class and notice to putative class members after denial of class certification. The costs requested involve legal research duplicating, printing, messenger services, and telephone charges. Because the Kohn, Swift & Graf firm did not comply with the court's order to submit fees and costs attributable to GRC's individual claims only, the court cannot determine whether any of the costs claimed are compensable, and will deny them for lack of substantiation.

Berger & Montague, P.C. claims \$1,849.81 in expenses for the period from November, 1990 to June, 1997. It is clear to the court from the submissions that Berger & Montague was engaged as co-counsel for class action issues. All costs seem clearly attributable to activities on behalf of the class. No costs will be awarded Berger & Montague, P.C.

Although plaintiff's counsel refuse to accept it, the putative class was not a prevailing party; only GRC was a prevailing party. Despite the court's Order to file for fees and expenses based on Graveley Roofing's claim only, there was no allocation of costs. This would be grounds for denying costs altogether, but the court has attempted to allocate with limited success. Any costs not recovered are attributable to counsel's failure to allocate costs to GRC's prevailing claims only.

V. Total

The fees and costs of the four law firms total \$33,649.61. The amount originally requested by plaintiffs, \$373,195.35, is grossly excessive. A fee request may be denied entirely where the request is unreasonable or so excessive it shocks the conscience of the court. If a reasonable award is granted in light of an outrageous request, there may be little deterrent to making excessive claims. See Fair Housing Council of Greater Washington v. Landow, 999 F.2d 92 (4th Cir. 1993); Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980). However, although this request did shock the conscience of the court, it will not be denied in its entirety but appropriate fees will be awarded.

CONCLUSION

The court will award plaintiff attorney's fees and costs totaling \$33,649.61. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL GRAVELEY, individually and : CIVIL ACTION
GRAVELEY ROOFING CORPORATION :
 :
v. :
 :
CITY OF PHILADELPHIA, et. al. : NO. 90-3620

ORDER

AND NOW this 12th day of August, 1998, upon consideration of plaintiffs' petition for reasonable attorney's fees, defendant's response in opposition thereto, plaintiff's reply, plaintiff's supplemental filings, defendant's motion to strike and in opposition to plaintiff's supplemental filings, and plaintiff's response in opposition thereto, it is **ORDERED** that:

1. Defendant's motion to strike plaintiff's supplemental filings is **DENIED**.

2. Plaintiffs' petition for attorney's fee is **GRANTED**.

3. Fees and costs are awarded to plaintiff's counsel, Lawrence E. Feldman & Associates, and Michael Needle, P.C. in the amount of \$33,649.61.:

| <u>1. L. Feldman & Associates</u> | <u>Hours</u> | <u>Rate</u> | <u>Fee</u> |
|---------------------------------------|--------------|-------------|--------------------|
| Lawrence E. Feldman | 46.75 | \$205 | \$ 9,583.75 |
| Roseann E. Weisblatt | 89.25 | 170 | 15,172.50 |
| Gail L. Gottehrer | 9.50 | 170 | 1,615.00 |
| Kenneth J. Benton | 27.75 | 170 | 4,717.50 |
| Costs | | | 1,484.61 |
| Total for L. Feldman & Associates | | | <u>\$32,573.36</u> |
| <u>2. Michael R. Needle</u> | 5.25 | 205 | \$ 1,076.25 |
| Total for Michael R. Needle | | | <u>\$ 1,076.25</u> |
| Total fees and costs | | | \$33,649.61 |

Norma L. Shapiro, J